

Feb 20, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RICHARD TODD KINKEADE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No.1:17-CV-00170-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney Christopher H. Dellert represents Richard Todd Kinkeade (Plaintiff); Special Assistant United States Attorney Michael S. Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion

1 for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;  
2 and **REMANDS** the matter to the Commissioner for additional proceedings  
3 pursuant to 42 U.S.C. § 405(g).

#### 4 **JURISDICTION**

5 Plaintiff filed applications for Supplemental Security Income (SSI) and  
6 Disability Insurance Benefits (DIB) on April 11, 2013, Tr. 231, alleging disability  
7 since January 31, 2012, Tr. 188, 190, due to a back condition, general anxiety  
8 disorder, bipolar disorder, essential tremor, left leg nerve damage, high blood  
9 pressure, agoraphobia, social phobia, and a cholesterol condition, Tr. 235. The  
10 applications were denied initially and upon reconsideration. Tr. 145-49, 153-59.  
11 Administrative Law Judge (ALJ) Caroline Siderius held a hearing on August 11,  
12 2015 and heard testimony from Plaintiff, psychological expert, Thomas McKnight,  
13 Ph.D., and vocational expert, Jeffrey Tittelfitz. Tr. 38-92. The ALJ issued an  
14 unfavorable decision on September 16, 2015. Tr. 10-22. The Appeals Council  
15 denied review on March 20, 2017. Tr. 1-4. The ALJ's September 16, 2015  
16 decision became the final decision of the Commissioner, which is appealable to the  
17 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
18 review on May 22, 2017. ECF Nos. 1, 4.

#### 19 **STATEMENT OF FACTS**

20 The facts of the case are set forth in the administrative hearing transcript, the  
21 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
22 here.

23 Plaintiff was 48 years old at the alleged date of onset. Tr. 188. He  
24 completed three years of college in 1985. Tr. 236. His work history includes the  
25 jobs driver/machine operator, manual laborer, and real estate appraiser. Tr. 236,  
26 251. Plaintiff reported that he stopped working on October 15, 2012 due to his  
27 conditions, but had made changes to his work activities because of his conditions  
28 as early as January 1, 2001. Tr. 236.

## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the claimant establishes that physical or mental impairments prevent him from engaging in his previous occupations. 20 C.F.R. §§

1 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,  
2 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
3 that (1) the claimant can make an adjustment to other work, and (2) specific jobs  
4 which the claimant can perform exist in the national economy. *Batson v. Comm’r*  
5 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
6 cannot make an adjustment to other work in the national economy, a finding of  
7 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 8 ADMINISTRATIVE DECISION

9 On September 16, 2015, the ALJ issued a decision finding Plaintiff was not  
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
12 activity since January 31, 2012, the alleged date of onset. Tr. 12.

13 At step two, the ALJ determined Plaintiff had the following severe  
14 impairments: “degenerative disc disease, and mental impairments described as  
15 panic disorder and mood disorder.” Tr. 13.

16 At step three, the ALJ found Plaintiff did not have an impairment or  
17 combination of impairments that met or medically equaled the severity of one of  
18 the listed impairments. Tr. 13.

19 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
20 determined he could perform light work with the following limitations:

21 the claimant can lift 20 pounds occasionally and 10 pounds frequently;  
22 can sit up to six hours per day; can stand or walk up to four hours per  
23 day; would need to be able to change positions once an hour for up to  
24 five minutes, with no need to leave the workstation; cannot climb  
25 ladders, ropes, or scaffolds; could occasionally climb stairs and ramps;  
26 occasionally crawl, kneel, and crouch; no work at unprotected heights;  
27 and no operating heavy machinery. The claimant is also limited to  
28 simple, repetitive, up to three-step tasks, with no detailed work; could  
have superficial, brief contact with the general public and co-workers;  
capable of only ordinary production requirements; would need to work

1 in a low-stress work environment; and would work better with things  
2 rather than people.

3 Tr. 15. The ALJ identified Plaintiff's past relevant work as landscape laborer and  
4 real estate appraiser and concluded that Plaintiff was not able to perform this past  
5 relevant work. Tr. 20.

6 At step five, the ALJ determined that, considering Plaintiff's age, education,  
7 work experience and residual functional capacity, and based on the testimony of  
8 the vocational expert, there were other jobs that exist in significant numbers in the  
9 national economy Plaintiff could perform, including the job of small products  
10 assembler II. Tr. 21. The ALJ concluded Plaintiff was not under a disability  
11 within the meaning of the Social Security Act at any time from January 31, 2012,  
12 through the date of the ALJ's decision. Tr. 22.

### 13 ISSUES

14 The question presented is whether substantial evidence supports the ALJ's  
15 decision denying benefits and, if so, whether that decision is based on proper legal  
16 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
17 medical source opinions and (2) failing to properly address Plaintiff's symptom  
18 statements.

### 19 DISCUSSION

#### 20 1. Medical Opinions

21 Plaintiff argues the ALJ failed to properly consider and weigh the medical  
22 opinions expressed by examining psychologist John Arnold, Ph.D. and  
23 nonexamining psychologist Thomas McKnight, Ph.D. ECF No. 13 at 3-9

24 In weighing medical source opinions, the ALJ should distinguish between  
25 three different types of physicians: (1) treating physicians, who actually treat the  
26 claimant; (2) examining physicians, who examine but do not treat the claimant;  
27 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
28 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more

1 weight to the opinion of a treating physician than to the opinion of an examining  
2 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
3 should give more weight to the opinion of an examining physician than to the  
4 opinion of a nonexamining physician. *Id.*

5 When an examining physician's opinion is not contradicted by another  
6 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,  
7 and when an examining physician's opinion is contradicted by another physician,  
8 the ALJ is only required to provide "specific and legitimate reasons" to reject the  
9 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be  
10 met by the ALJ setting out a detailed and thorough summary of the facts and  
11 conflicting clinical evidence, stating her interpretation thereof, and making  
12 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
13 required to do more than offer her conclusions, she "must set forth [her]  
14 interpretations and explain why they, rather than the doctors', are correct."  
15 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

16 **A. John Arnold, Ph.D.**

17 On March 13, 2013, Dr. Arnold completed a Psychological/Psychiatric  
18 Evaluation form for the Washington Department of Social and Health Services  
19 (DSHS). Tr. 577-83. He diagnosed Plaintiff with social phobia, rule out insomnia,  
20 panic disorder with agoraphobia, alcohol abuse in sustained full remission, and  
21 paranoid personality features. Tr. 577. He provided the following residual  
22 functional capacity statement:

23 Todd is capable of understanding and carrying out instructions. He can  
24 only concentrate for short periods of time. Todd can complete tasks  
25 without close supervision and not disrupting others. He would work  
26 best in positions that have minimal interaction with others. He can use  
27 the bus for transportation. He can recognize hazards and take  
28 appropriate precautions.

1 Tr. 578.

2 Dr. Arnold evaluated Plaintiff again on January 29, 2015 for DSHS and  
3 completed a Psychological/Psychiatric Evaluation form. Tr. 585-89. He  
4 diagnosed Plaintiff with alcohol use disorder in full remission, panic disorder with  
5 agoraphobia, major depressive disorder, rule out somatoform disorder, and  
6 personality disorder with avoidant features. Tr. 586. He opined that Plaintiff had a  
7 marked limitation in five basic work activities and a moderate limitation in six  
8 basic work activities. Tr. 587.

9 The ALJ gave partial weight to the opinions, stating that he gave significant  
10 weight to the objective findings based on his mental examinations, but that “the  
11 overall evidence shows a longitudinal picture of lesser limitation than those opined  
12 by Dr. Arnold, who did not have a treating relationship with the claimant. Thus  
13 the overall record supports lesser limitations, as described in the residual functional  
14 limitation, and supported by the overall evidence, as discussed herein.” Tr. 19.  
15 This was the end of the ALJ’s discussion weighing Dr. Arnold’s opinions. *Id.*

16 Dr. Arnold is an examining psychologist; therefore, the ALJ was required  
17 provide at least specific and legitimate reasons for rejecting his opinions. *Lester*,  
18 81 F.3d at 830-31. The ALJ’s minimal discussion and simple assertion that “the  
19 overall evidence shows a longitudinal picture of lesser limitation than those opined  
20 by Dr. Arnold” fails to meet this standard. The ALJ failed to state what opined  
21 limitations were found to be inconsistent with the longitudinal record and how  
22 these opined limitations were inconsistent with the longitudinal record. The ALJ is  
23 required to do more than offer her conclusions, she “must set forth [her]  
24 interpretations and explain why they, rather than the doctors’, are correct.”  
25 *Embrey*, 849 F.2d at 421-22.

26 Defendant asserts that Plaintiff failed to actually challenge the weight the  
27 ALJ gave Dr. Arnold’s opinion and, instead, Plaintiff simply asserted that Dr.  
28 Arnold was entitled to more weight than Dr. McKnight. ECF No. 14 at 7. While

1 Plaintiff's briefing mainly focused on reasons why Dr. McKnight's opinion should  
2 not have been given controlling weight, Plaintiff did argue that the ALJ's  
3 reasoning for rejecting Dr. Arnold's opinion failed to meet the specific and  
4 legitimate standard. ECF No. 13 at 5. This Court agrees. Therefore, the case is  
5 remanded for the ALJ to readdress Dr. Arnold's opinions.

6 **B. Thomas McKnight, Ph.D.**

7 Dr. McKnight testified at Plaintiff's August 11, 2015 hearing. Tr. 42-54.  
8 He had reviewed the record through exhibit 20F. Tr. 42. He diagnosed Plaintiff  
9 with a mood disorder secondary to medical-related issues that is not additive to the  
10 difficulty Plaintiff is having. Tr. 50. He then provided his opinion as to the "B  
11 Criteria" of Listing 12.02, stating that objective evidence supported a finding of  
12 mild limitation in restriction of activities of daily living, mild difficulty in  
13 maintaining social functioning, mild difficulties in maintaining concentration,  
14 persistence, and pace, and no episodes of decompensation. Tr. 50-51. Dr.  
15 McKnight failed to provide a residual functional capacity opinion at the hearing.  
16 Tr. 42-54. The ALJ gave this opinion "great weight" while rejecting the  
17 limitations opined by Dr. Arnold, who examined Plaintiff. Tr. 19.

18 The opinion of a non-examining physician cannot by itself constitute  
19 substantial evidence that justifies the rejection of the opinion of either an  
20 examining physician or a treating physician. *Lester*, 81 F.3d at 831, *citing Pitzer v.*  
21 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). However, the opinion of a non-  
22 examining physician may be accepted as substantial evidence if it is supported by  
23 other evidence in the record. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31.  
24 The Ninth Circuit has upheld the rejection of an examining or treating physician  
25 based, on part, on the testimony of a non-examining medical advisor; but those  
26 opinions have also included reasons to reject the opinions of examining and  
27 treating physicians that were independent of the non-examining doctor's opinion.  
28 *Lester*, 81 F.3d at 831, *citing Magallanes*, 881 F.2d at 751-55 (reliance on imaging



1 results, contrary reports from examining physicians, and testimony from the  
2 claimant that conflicted with treating physician's opinion); *Roberts v. Shalala*, 66  
3 F.3d 179, 184 (9th Cir. 1995) (rejection of examining psychologist's functional  
4 assessment which conflicted with his own written report and test results). Here,  
5 the ALJ's failure to provide legally sufficient reasons to reject the limitations  
6 opined by Dr. Arnold means that Dr. McKnight's opinion alone is insufficient to  
7 support the ALJ's treatment of Dr. Arnold's opinions and, as a result, the residual  
8 functional capacity determination of the ALJ.

9 Furthermore, Dr. McKnight's opinion did not address Plaintiff's residual  
10 functional capacity and instead focused on Plaintiff's ratings under the B Criteria  
11 of Listing 12.02. "The adjudicator must remember that the limitations identified in  
12 the 'paragraph B' and 'paragraph C' criteria are not an RFC [residual functional  
13 capacity] assessment but are used to rate the severity of mental impairment(s) at  
14 steps 2 and 3 of the sequential evaluation process." S.S.R. 96-8p. Therefore, Dr.  
15 McKnight's opinion is only applicable to steps two and three and not to the  
16 residual functional capacity determination.

17 Therefore, upon remand, the ALJ will readdress the opinion of Dr.  
18 McKnight in terms of S.S.R. 96-8p and call a new psychological expert to testify  
19 regarding Plaintiff's mental residual functional capacity.

## 20 **2. Plaintiff's Symptom Statements**

21 Plaintiff contests the ALJ's finding that his symptom statements were less  
22 than fully credible. ECF No. 13 at 9-13.

23 It is generally the province of the ALJ to make credibility determinations,  
24 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific  
25 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
26 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's  
27 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d  
28 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. "General findings are

1 insufficient: rather the ALJ must identify what testimony is not credible and what  
2 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

3 The ALJ found Plaintiff's symptom statements to be less than fully credible  
4 concerning the intensity, persistence, and limiting effects of his symptoms. Tr. 16.  
5 The ALJ reasoned that Plaintiff was less than fully credible because (1) his  
6 symptom statements were not supported by the objective medical evidence (2) his  
7 symptom statements were inconsistent with his reported activities, and (3) his  
8 symptom statements were not supported by his conservative treatment. Tr. 16-  
9 18.

10 The evaluation of a claimant's symptom statements and their resulting  
11 limitations relies, in part, on the assessment of the medical evidence. *See* 20  
12 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case  
13 being remanded for the ALJ to address the medical source opinions in the file, a  
14 new assessment of Plaintiff's subjective symptom statements is necessary.

### 15 **3. Step Five**

16 Plaintiff appeared to make a step five challenge, asserting that "[t]he ALJ  
17 also erred in failing to obtain an explanation for the inconsistency between the  
18 vocational expert's testimony that Plaintiff could perform the job of small parts  
19 assembler and the limitation to 'simple, repetitive, up to three-step tasks with no  
20 detailed work.'" ECF No. 13 at 3. Plaintiff failed to address this argument in  
21 detail in the remainder of his brief. However, since the case is being remanded for  
22 the ALJ to readdress the medical source statements and Plaintiff's symptom  
23 statements, this will result in new step four and five determinations. Thus,  
24 addressing the issue. Additionally, as part of the remand, the ALJ will call a  
25 vocational expert to testify at a new hearing.

### 26 **REMEDY**

27 The decision whether to remand for further proceedings or reverse and  
28 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,

1 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
2 where “no useful purpose would be served by further administrative proceedings,  
3 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
4 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
5 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
6 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
7 (noting that a district court may abuse its discretion not to remand for benefits  
8 when all of these conditions are met). This policy is based on the “need to  
9 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
10 outstanding issues that must be resolved before a determination can be made, and it  
11 is not clear from the record that the ALJ would be required to find a claimant  
12 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
13 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
14 F.3d 1172, 1179-80 (9th Cir. 2000).

15 In this case, it is not clear from the record that the ALJ would be required to  
16 find Plaintiff disabled if all the evidence were properly evaluated. Further  
17 proceedings are necessary for the ALJ to address the medical source opinions in  
18 the file and Plaintiff’s symptom statements. Additionally, the ALJ will supplement  
19 the record with any outstanding evidence and call a medical, a psychological, and a  
20 vocational expert to testify at the hearing.

## 21 CONCLUSION

22 Accordingly, **IT IS ORDERED:**

- 23 1. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is  
24 **DENIED**.
- 25 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is  
26 **GRANTED**, and the matter is **REMANDED** to the Commissioner for additional  
27 proceedings consistent with this Order.
- 28 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order and provide a copy  
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
3 and the file shall be **CLOSED**.

4 DATED February 20, 2018.



A handwritten signature in black ink, consisting of stylized, flowing letters that appear to read "M" followed by a long horizontal stroke.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE

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